IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 348

EDNA ALBRIGHT, WIDOW OF CLAYTON L. ALBRIGHT, DECEASED,

Petitioner,

vs.

THE PENNSYLVANIA RAILROAD COMPANY, A BODY CORPORATE, EMPLOYER AND SELF-INSURER,

Respondent.

PETITION OF EDNA ALBRIGHT FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND AND BRIEF IN SUPPORT THEREOF.

PAUL BERMAN,
FISHER & FISHER,
HAMILTON O'DUNNE,
Counsel for Petitioner.

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vs.

THE PENNSYLVANIA RAILROAD COMPANY, A BODY CORPORATE, EMPLOYER AND SELF-INSURER,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO REVIEW A JUDGMENT ENTERED JUNE 14, 1944, BY THE COURT OF APPEALS OF MARYLAND, AFFIRMING THE ORDER OF THE BALTIMORE CITY COURT, REVERSING THE DECISION OF THE STATE INDUSTRIAL ACCIDENT COMMISSION OF MARYLAND AND RENDERING A JUDGMENT NON OBSTANTE VEREDICTO IN FAVOR OF THE RESPONDENT, THE PENNSYLVANIA RAILROAD COMPANY.

To the Honorable Chief Justice and Associates of the Supreme Court of the United States:

Your Petitioner, Edna Albright, prays that a Writ of Certiorari issue to review the judgment entered June 14, 1944 in the Court of Appeals of Maryland (R. Appendix 1) in the above entitled cause.

OPINION BELOW.

There was no opinion in this case by either the Maryland State Industrial Accident Commission or by the Court of Common Pleas of Baltimore City. The opinion of the Court of Appeals of Maryland was rendered on June 14, 1944 and has now been reported only in the Atlantic Reporter Advance Sheets, published July 22, 1944, 37 A. 2d 870.

JURISDICTION.

The jurisdiction of this Court to issue a writ of certiorari to review the judgment of June 14, 1944, by the Court of Appeals of Maryland is invoked under Sec. 237 (b) of the Judicial Code as amended (28 U. S. C. A. 344 (b)). See also Rule 38 of this Court, adopted February 13, 1939, as amended.

STATUTES INVOLVED.

The Federal Statute involved is 45 U. S. C. A. 51, and particularly the second paragraph thereof, which is an amendment enacted in 1939. The entire Act reads as follows:

> "Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for

such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

"Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter."

The State Statute involved is Article 101 of the Maryland Code, 1939, which is the Maryland Workmen's Compensation Act, but the only two sections deemed applicable are Section 44 and Section 79. The applicable portion of Section 44 is as follows:

"The provisions of this Article shall apply to employers and employees engaged in intrastate and also in interstate or foreign commerce, for whom a rule of liability or method of compensation has been or may be established by the Congress of the United States, only to the extent that their mutual connection with intrastate work may and shall be clearly separable and distinguishable from interstate or foreign commerce, except that any such employer and any of his workmen only in this State may, with the approval of the Commission, and so far as not forbidden by any Act of Congress, voluntarily accept the provisions of this Article by filing written acceptance with the Commission, which shall subject the acceptors to the provisions of this Article to all intents and purposes as if they had been originally included in its terms."

That part of Section 79 which is regarded as relevant provides that "in any proceeding for the enforcement of a

claim under this Article, it shall be presumed in the absence of substantial evidence to the contrary: (A) that the claim comes within the provisions of this Article."

STATEMENT OF THE CASE.

The Pennsylvania Railroad, on the 24th day of January, 1943, and for some time prior thereto, maintained a produce terminal at the general location of North and Mount Royal Avenues, in the City of Baltimore. This yard comprises "about ten delivery tracks and about five running tracks" (R. 14). To the side of the tracks is a long two-story shed, the second story of which is used for offices; the first floor (which is closed at night by drop doors), consists of platforms, where sample goods are displayed (R. 12). This terminal is maintained chiefly for Baltimore brokers who deal, generally, in perishable goods, (such as fruits and vegetables) which are shipped from points out of this State and delivered to them at this terminal. Some of the brokers rent platforms in this shed. Upon delivery of a car of produce the seal is broken, samples taken from the car and displayed on these platforms. These brokers sell the goods shipped to them at the terminal and when sold the purchaser unloads the car (R. 14). Other brokers do not rent platforms but break the seal and exhibit the products in the car direct to prospective purchasers, and when they sell, these cars too are unloaded by the purchasers (R. 22-23). The terminal is open "from midnight until 3 P. M. the next day." No cars are unloaded on Sundays, except as hereinafter noted (R. 24). Most of the freight received at the terminal is sold in Baltimore. If, however, the Baltimore market is inactive, some of this freight is reconsigned to points outside of Maryland. Most of the shipments received at this terminal, however, are sold in Baltimore and but a small portion of the freight is reconsigned (R. 14, 24-25). The

freight destined for the terminal is received at the Mount Vernon Yards, on the main line of the railroad; the cars are put on a siding, and from there delivered by switch engines to the terminal. As soon as cars arrive at the terminal, consignees are notified, either person to person or by telephone (R. 14). They are given forty-eight hours after seven A. M. of the day of their notification by the railroad of the arrival of a shipment within which to move the freight from the car (R. 23). On the night of January 23, 1943, there were one hundred and eight cars (loaded and empty) on the tracks at the produce terminal (R. 18). Most of the goods shipped in these cars were for delivery in Baltimore (R. 19). On the night of January 24, 1943, Clayton L. Albright sustained an injury at this produce terminal, of which he died on the 4th of February, 1943. He was employed by the railroad as a special policeman and commissioned by the Governor of Maryland as a special policeman for the State of Maryland (R. 38), and assigned for duty at this terminal to patrol the yard in general and prevent thefts (R. 12). His hours were from 4 P. M. until 12 Midnight (R. 11). He was required to examine cars in the yard and those arriving while on duty, to determine whether seals on these cars were broken. If he found a seal broken, he would apply another seal to the car, in order to safeguard the lading, it being his duty to see that no theft was committed from the cars (R. 12), as well as to keep unauthorized persons out of the premises. He had nothing to do with shifting, loading or moving any of the cars. His only duties were to patrol the yard and guard the premises (R. 13).

Edna Albright, widow of the deceased, filed a claim for compensation before the State Industrial Accident Commission, and, after a hearing, at which the issue was raised of whether the deceased was engaged in interstate commerce, the Commission awarded her compensation (R.

8-9). From this finding of the Commission, the Railroad Company appealed to the Court of Common Pleas of Baltimore City (R. 9-10). The case was tried, submitted to the jury, on the same issue, and the jury, by its verdict, sustained the Commission. Thereafter, the railroad filed a motion for a judgment non obstante veredicto, which motion was granted, thereby reversing the decision of the State Industrial Accident Commission of Maryland and from a judgment made absolute in favor of the employer and self-insurer (R. 42-43), the claimant appealed to the Court of Appeals of the State of Maryland.

This judgment was sustained by the Maryland Court of Appeals which held that the deceased was engaged at the time of the accident in duties in furtherance of interstate commerce and that, therefore, his widow's remedy, if any, would be governed by the provisions of the Federal Employers' Liability Act[1] exclusively and that there could be no recovery under the State Workmen's Compensation Statute.

CASES SUSTAINING JURISDICTION.

The cases believed to sustain the jurisdiction of this Court are:

Tiller v. Atlantic Coast Line R. R. Co., 318 U. S. 54, 87 L. Ed. 610, 63 S. Ct. 444 (1943);
Davis v. Department of Labor, 317 U. S. 249, 87 L. Ed. 175, 63 S. Ct. 225 (1942).

QUESTIONS PRESENTED.

A. Where an individual is employed by a railroad company as a watchman of a terminal located wholly within the territory of a single state for the purpose of guarding the contents of the terminal against theft, and while engaged in his duties as watchman is killed without negli-

[1] 45 U. S. C. A. 51.

gence on the part of his employer, is his widow precluded from being granted an award by the State Industrial Accident Commission which does not make the employer's negligence a prerequisite to an award, or must her sole grounds of relief be the Federal Employers' Liability Act which requires negligence on the part of the employer before any damages can be awarded?

REASONS FOR GRANTING THE WRIT.

The opinion of the Court of Appeals is based on its particular interpretation of the effect of the 1939 amendment to the Federal Employers' Act, which is construed as including work of a character as theretofore was regarded as not being within scope of that Statute.

This Court has never ruled on the proper scope and effect of the 1939 amendment to the Federal Employers' Liability Act and both State and Federal authorities are in conflict with respect to its purpose and proper scope and effect. The Maryland Court of Appeals regards the amendment as no longer requiring that the employment affect interstate *transportation* (R. appendix, p. 4), although this has been the test adopted by this Court, *Chicago, B. & Q. R. Co. v. Harrington*, 241 U. S. 177, 60 L. Ed. 941, 36 S. Ct. 517 (1916); *N. Y. Central R. R. v. White*, 243 U. S. 188, 61 L. Ed. 667, 37 S. Ct. 247 (1917); *Chicago & N. W. Ry. Co. v. Bolle*, 284 U. S. 74, 76 L. Ed. 173, 52 S. Ct. 59 (1931), and states that the nature of the work being done at the time of the injury is the decisive factor in spite of a completely contrary Congressional intent, as expressed in the Senate Report on the amendment.[2]

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[2] Senate Report 661, 67th Cong. 1st Sess. 1939, states that it is the purpose of the amendment to include "employees of carriers who, *while ordinarily* engaged in the transportation of interstate commerce, may be, at the time of injury, *temporarily* divorced therefrom and engaged in intrastate operations." (Italics ours.)

The conflicting interpretations of the amendment have led to the adoption of different tests in different states. The case of *Louisville & N. R. Co. v. Potts, et al.*, 178 Tenn. 425, 158 S. W. 2d 729 (1941), adopts as the true test the general duties of the employee regardless of his activities at the time of injury. *Moser v. Union Pac. R. Co.*, 147 Pac. (2d) 336 (1944), holds that the nature of the duties at the time of injury is controlling, but recognizes a distinction between *transportation* and commerce, and *Ermin v. Pennsylvania R. Co.*, 36 Fed. Supp. 936 (1941), although recognizing that the character of the employment at the moment of injury is not controlling, indicates that the act was designed to cover intrastate employment in any way affecting interstate commerce.

A review of this case would furnish a definite standard by which the proper extent of this amendment could be determined in future cases.

The Court of Appeals of Maryland in deciding that the deceased was engaged in interstate commerce reached a conclusion in conflict with Federal cases in which similar facts were involved,

Delaware, L. & W. R. Co. v. Scales, 18 F. (2d) 73 (1927);

Feaster v. Southern R. R. Co., et al., 15 F. (2d) 540 (1926);

and ruled contrary to decisions reached in other states on closely corresponding facts.

Southern R. R. Co. v. Varnell, 222 Ala. 237, 131 So. 803 (1930), Cert. Den. 283 U. S. 852;

Thomson v. Industrial Commission, 380 Ill. 386, 44 N. E. (2d) 19 (1942), Cert. Den. 318 U. S. 755;

Grand Trunk Western R. R. v. Industrial Commission, 291 Ill. 167, 125 N. E. 748 (1920);

Chicago & Alton R. R. Co. v. Industrial Commission, et al., 290 Ill. 599, 125 N. E. 378 (1919); *Chicago, Rock Island & Pacific R. R. Co. v. Industrial Board*, 273 Ill. 528, 113 N. E. 80, L. R. A. 1916 F. 540 (1916).

The Maryland Court of Appeals in holding that the remedy of an employee of this character is exclusively within the Federal Act, has reached a conclusion contrary to the recent indication of this Court, as expressed in *Davis v. Department of Labor, supra*, to the effect that although a general class of employees may be protected by a Federal Act, there are nevertheless employees within that class who occupy a shadowy area "within which, at some undefined and undefinable point state laws can validly provide compensation."

The general hazards with which watchmen, who usually work alone, are confronted, are such that resulting injuries therefrom can usually not be attributed to the negligence of the Railroad employer and thus if their sole recovery is to be under the Federal Act, they would be, in most cases of injury, left virtually without any remedy.

For these reasons, it is respectfully submitted that this petition should be granted.

Respectfully submitted,

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